| **Rudman v Deane** |
| --- |
| 2014 NY Slip Op 32000(U) |
| May 22, 2014 |
| Sup Ct, NY County |
| Docket Number: 650159/2010 |
| Judge: Shirley Werner Kornreich |
|  |
|  |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

HARVEY RUDMAN and HAROLD KUPLESKY, on behalf of each of them individually and on behalf of Starrett City Preservation, LLC, derivatively,

Plaintiffs,

-against-

CAROL GRAM DEANE, THE ESTATE OF DISQUE D. DEANE by Carol G. Deane as Temporary Executrix, SALT KETTLE LLC, ST. GERVAIS LLC, STARRETT CITY PRESERVATION LLC, DD SPRING CREEK LLC, SK SPRING CREEK LLC, SPRING CREEK PLAZA LLC, DD SHOPPING CENTER LLC and SK SHOPPING CENTER LLC,

Defendants.

----------X

Index No.: 650159/2010

**DECISION AND ORDER**

KORNREICH, SHIRLEY WERNER, J.:

Plaintiff Harvey Rudman moves to dismiss the counterclaims alleging breach of fiduciary duty and unfair competition, asserted against him by the Estate of Disque D. Deane (the Estate). The Estate opposes. For the reasons that follow, the court grants the motion and dismisses the counterclaims.

*I. Background*

The facts giving rise to this litigation are set forth in this court's decision and order on Motion Sequence No. 007 and familiarity with them is presumed. Starrett City is a large affordable housing project in east Brooklyn. Title to the complex is held by Starrett City, Inc. (SCI) for the benefit of Starrett City Associates, L.P. (SCA). The general partners of SCA were

an individual named Disque Deane and Salt Kettle LLC, an entity controlled by Deane and his family.

On April 29, 2009, plaintiff Harvey Rudman was fired from his positions at both SCA and SCI, where he had served on the executive team for many years. Thereafter, Rudman and another former Starrett City employee, Harold Kuplesky, commenced the instant action, alleging, in substance, that defendants, including, at that point, Deane, had denied them the full benefits of their membership in Starrett City Preservation, LLC, an entity created to receive, and distribute to its members, all or some of the general partners' economic interest in SCA. Soon after the court granted plaintiffs leave to file a second amended complaint, Deane passed away and The Estate was substituted as a defendant.

In its answer to the second amended complaint, the Estate claims that Rudman took possession of certain documents, records, and electronic files "containing Deane's business, financial, personal and proprietary information," and has since refused to return them (Estate answer, ¶ 187, 189). The Estate further alleges that Rudman is currently employed in the real estate management business and that his retention of the aforementioned documents has provided him with an unfair competitive advantage (*id.* at ¶ 194). Based on the foregoing, the Estate asserts counterclaims against Rudman for breach of fiduciary duty and unfair competition. It seeks the return of the documents and punitive damages. Rudman, in reply, denies the allegations and asserts affirmative defenses: 1) failure to state a claim; 2) waiver, estoppel, laches or unclean hands; 3) standing; and 4) absence of an employer-employee relationship between Deane and Rudman. In response to interrogatories posed by plaintiffs to the Estate, attorneys for the Estate indicated that the "real estate management business" that the Estate

claims Rudman continues to be involved in is a company known as "Andrea Bunis, Inc." (affirmation of David J. Eiseman, July 3, 2013 [Eiseman moving affirmation], exhibit G, 8). A note of issue was filed on November 20, 2012. Rudman now moves for summary judgment dismissing the Estate's counterclaims.

*II. Plaintiff's Submissions*

*A. Testimony of Harvey Rudman*

Rudman has stated that beginning in 1989, he served as the chief operating officer (CEO) and president of both SCI and SCA (affidavit of Harvey Rudman, sworn to on July 2, 2013 [Rudman moving affidavit], ¶ 2; affirmation of David J. Eiseman, July 3, 2013, exhibit C [Rudman deposition], 13, 18, 32). While employed at Starrett City, he performed work for other real estate entities in which Deane had an interest (Rudman moving affidavit, ¶ 3; Rudman deposition, 214–15). Rudman was paid by SCA, but never had an employment agreement (Rudman moving affidavit ¶¶ 4–5).

Rudman explained that in order to work at home, he sometimes took copies of documents home or forwarded emails from his work account to his personal account (Rudman moving affidavit, ¶ 6; Rudman deposition, 198). He also avers that in December 2008, while SCA was soliciting final bids in its attempt to sell Starrett City, he was planning to go to Colorado for a two or three week vacation (Rudman moving affidavit, ¶ 8; Rudman deposition, 192). He, therefore, requested that the SCA's IT consultants copy files relating to that transaction onto a portable USB drive in case he needed to "address matters . . . relating to the bids as well as other work matters that had recently arisen or were anticipated to arise" (Rudman moving affidavit, ¶ 8; *see also* Rudman deposition, 191–92). According to Rudman, Curt Deane and Iris Sutz, other

individuals who worked at SCA, were aware of his download at the time and no one objected (Rudman moving affidavit, ¶ 9). Rudman stated that taking copies of documents home was the regular practice of Starrett City employees (*id.* at ¶ 7). Rudman further averred that he never removed any original documents from the SCA offices, never disclosed the documents in his possession to any third-party, and never used them in connection with any business "other than a Deane-related business" (Rudman moving affidavit, ¶¶ 6, 15).

Additionally, Rudman claimed that while he has known Andrea Bunis for nearly forty years, he has never worked for her management firm, Andrea Bunis Management, Inc. (ABMI) (Rudman moving affidavit, ¶ 18; Rudman deposition, 585–86). When presented at his deposition with what was claimed to be a printout from ABMI's 2006 website listing him as ABMI's chief financial officer (CFO), Rudman explained that in 2005 Ms. Bunis was anticipating additional business and discussed retaining him as a consultant (Rudman moving affidavit, ¶ 18; Rudman deposition, 591–94). However, according to Rudman, the anticipated expansion did not occur, and he learned that he could not serve as an officer of ABMI without obtaining a real estate broker's license (Rudman moving affidavit, ¶ 18; Rudman deposition, 594–95). Thus, he contended, his planned collaboration with ABMI did not come to fruition, regardless of what the website said (Rudman moving affidavit, ¶ 18; Rudman deposition, 595). Rudman added that in 2005, "Curt Deane, Iris Sutz and others in the [SCA] office . . . knew that ABMI was planning to list [him] in [its] materials, and never raised any questions or concerns about it" (Rudman moving affidavit, ¶ 19; *see also* Rudman deposition, 594:22–25)

*B. LMS Invoice*

Rudman has submitted an invoice from LMS Tech, SCA's IT consultant (Eiseman moving affirmation, exhibit F; *see id.* at exhibit E [Sutz deposition], 539–41). The invoice, dated December 4, 2008, is addressed to Iris Sutz (Eiseman moving affirmation, exhibit F) and details charges incurred for backing up Rudman's emails onto a USB drive (*id.*).

*C. Deposition of Andrea Bunis*

Bunis testified that her company, ABMI, is in the business of managing co-ops and condominiums (Eiseman moving affirmation, exhibit H [Bunis deposition], 25). She stated that while she is friends with Rudman, he "is not involved in [her] business" and has never served as CFO of ABMI (*id.* at 130, 52). Bunis stated that she discussed retaining the services of Rudman and put his name on ABMI's website at a time when she believed she might get additional business (*id.* at 47–48). Moreover, Bunis testified that ABMI "do[es] not want to do and ha[s] never wanted to do subsidized housing," though she conceded that she may have spoken with Rudman regarding a Mitchell-Lama project known as "Rochdale Village" (*id.* at 61–62).

*D. Deposition of Carol Deane*

Carol Deane testified that the basis for the Estate's counterclaims[1] was her belief that not all documents that Rudman removed had been returned (Eiseman moving affirmation, exhibit D [Carol deposition], 202). She particularly noted that she had been unable to locate the "corporate books" for a project known as "Landings at Fresh Creek," which were kept in Rudman's office (*id.* at 201–02, 205:15–16). However, she was unable to state when she had last seen the Fresh Creek records in Rudman's office (*id.* at 205:3–6, 205:21–206:11). Further, conceding no personal knowledge or what documents, she claimed that "certain files and records [are] missing

[1] According to the Estate's answer, Carol is its temporary executrix.

from the Starrett server" (*id.* at 207:25–208:5, 209–10). Moreover, she could not identify the source of her information (*id.* at 209:16–24) and conceded that she had no knowledge connecting Rudman to the supposed removal of these documents (*id.* at 210:16–20, 211). Carol testified that she did not know whether, prior to April 2009, Rudman had ever used documents he obtained from the SCA offices for anything other than his work for Starrett City (*id.* at 211:14–22).

In addition, Carol testified that her husband was aware that the ABMI website listed Rudman as an officer and was unconcerned "as long as it didn't interfere with what [Rudman] was doing . . . for us and at Starrett City" (*id.* at 192:21–193:5). She stated that she was only troubled by Rudman's apparent association with ABMI to the extent that ABMI was involved in affordable housing management (*id.* at 193:5–10). Carol admitted that she did not know whether ABMI did any such work and that no Deane entity was engaged in ABMI's primary business of co-op or condominium management (*id.* at 255).

*III. Defendant's Submissions*

*A. Deposition of Curt Deane*

Curt Deane denied that Rudman had ever told him that he had downloaded files or emails from his computer, averring that he only remembered that at some point (he could not say when), Rudman had told him that he was trying to download certain photographs (affirmation of Kenneth Warner, August 14, 2013, exhibit 11 [Curt deposition], 212–13). He testified that he only learned of Rudman's file download by chance through a conversation with an LMS technician, whose name he could not recall (Curt deposition, 213–14).

*B. Deposition of Iris Sutz*

Iris Sutz denied that Rudman made her aware of his December 2008 email download and claimed she learned about it when she received the LMS invoice discussed above (Eiseman moving affirmation, exhibit E; Warner affirmation, exhibit 12 [Sutz deposition], 540, 542). She explained that she raised no objections to Rudman's actions because it was not her place to do so, as he was her superior (*id.* at 541). She further testified that Rudman began to clean out his office in December, which, along with his email download, raised concerns at SCA, but she was uncertain as to when those concerns were first raised (*id.* at 542–43).

Sutz further testified that in 2006 Rudman asked her to proofread an ABMI brochure, which referred to him as a chief financial officer of that company (*id.* at 391). At some point, Sutz mentioned this fact to the Deanes, though she does not recall when she did so (*id.* at 392).

*C. Other Submissions*

The Estate has submitted two letters, dated April 29, 2009 (the date of Rudman's termination), from the Deanes to J.P. Morgan Chase, instructing the bank to remove Rudman as an authorized signatory for a number of accounts, including accounts in the name of Disque and Carol or in the name of Carol as custodian for individuals named Anne and Carl Deane (Warner affirmation, exhibit 5). Also presented as evidence is a ledger sheet bearing the heading "Woodward Management LLC", which appears to show that monthly checks were made out to Rudman from January through June 2001 (Warner affirmation, exhibit 7, 1). Additionally submitted is a memo to Disque, dated July 23, 2001, which mentions that Disque had requested that Rudman "be removed as a member from Woodward Management LLC . . . to transfer his percentage of 19% to Saint Gervais LLC," and that "going forward" Rudman would be paid out of SCA's account (*id.* at 2). Another submission is a letter from Disque to an SCA partner, dated

April 6, 1999, in which Disque states that Rudman "is paid half by SCA and the balance from [his] resources or non-SCA compensation" (Warner affirmation, exhibit 10).

Finally, the Estate has submitted 1) a residential lease and renewal, dated 1986 and 1994, respectively, in which Bunis and Rudman were co-tenants (*id.*, exhibits 23 & 24), 2) an April 27, 2007 email from Rudman to Bunis (*id.*, exhibit 26) and 3) a November 9, 2005 email from Rudman to Bunis (*id.*, exhibit 27). In the 2007 email, Rudman wrote: "If the folks from Rochdale call you-tell them you plan to speak to Mr. Rich McCurnan at DHCR which you know is the supervisory agency for the Mitchell-Lama Co-op. It will show them you know the players and the game" (*id.*, exhibit 26). In the 2005 email, Rudman simply forwarded an email he had received which attached a blank HUD form (*id.*, exhibit 27).

*IV. Standard*

The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]). Failure to make such a showing requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). However, if a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d at 562). The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept. 1997]). Mere conclusions, unsubstantiated allegations, or expressions of hope are

insufficient to defeat summary judgment (*Zuckerman*, 49 NY2d, at 562). Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

*V. Discussion*

*A. Standing*

Rudman argues that the Estate lacks standing to pursue either of its counterclaims, as he was not employed by Deane personally but rather by the entity or entities in which Deane was a partner or member and through which Deane engaged in the real estate management business. Similarly, Rudman maintains that because Deane participated in the business through these companies, not personally, he cannot maintain an unfair competition claim.

No admissible evidence demonstrates that Deane, personally, paid Rudman. The unverified letter indicating that at some point Rudman was a signatory on certain bank accounts does not even explain the nature of the accounts. Similarly unverified and of no avail are the documents indicating that Rudman was, at one point, a member of Woodward Management LLC, another entity in which Deane had an interest, and a 1999[2] statement made by Deane that Rudman's salary was paid "half by SCA and the balance from my resources or non-SCA compensation." Nor does any evidence suggest that Deane, in his individual capacity, acted as a real estate manager anywhere.

---

[2] Incidentally, if the court were to accept this unverified letter as evidence, it would appear to contradict the Estate's contention that "it was not until mid-2001 that Rudman first received any paycheck at all from SCA" (opposition brief 7).

Moreover, nothing in the record controverts Rudman's testimony that he served as an officer for SCA and SCI, not for Deane. To be sure, the mere fact Rudman was not legally employed by Deane does not necessarily mean that he *could* not have been Deane's fiduciary. However, the Estate has produced no admissible evidence showing or suggesting that Deane placed such a "high level of confidence and reliance" in Rudman that Rudman thereby exercised "control and dominance" over him (*People ex rel. Cuomo v Coventry First LLC*, 13 NY3d 108, 115 [2009] [citations omitted]). In short, all that the record reveals is that Rudman, at the behest of Deane, performed various services for entities in which Deane had an interest. Consequently, the Estate's counterclaims are dismissed for lack of standing.

*B. Breach of Fiduciary Duty*

Even were standing not an issue, the counterclaims require dismissal. To establish a claim for breach of fiduciary duty, the alleged fiduciary (1) must owe such a duty, (2) commit misconduct, and (3) cause the claimant to suffer damages (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699–700 [1st Dept 2011] [citations omitted]). The alleged breach, here, was grounded in Rudman's employment by SCA and other Deane-related entities (*see* Estate answer, ¶¶ 184, 190). An employee's duty of loyalty forbids him from diverting business opportunities from his employer for the benefit of himself or others (*see, e.g., Lamdin v Broadway Surface Adv. Corp.*, 272 NY 133 [1936]; *Bon Temps Agency Ltd. v Greenfield*, 184 AD2d 280 [1st Dept 1992]; *Maritime Fish Products, Inc. v World-Wide Fish Products, Inc.*, 100 AD2d 81 [1st Dept] *appeal dismissed* 63 NY2d 675 [1984]). Here, however, the only items that defendants can offer in support of their claim that he breached his fiduciary duty are two emails that Rudman sent to Bunis a year and a half apart. One gives Bunis a tip as to how to impress "the folks from

Rochdale." The other, without comment, attaches a blank HUD form. Neither constitutes evidence that Rudman actually diverted a subsidized housing opportunity from SCA to ABMI or anyone else.

The unrefuted evidence submitted by Rudman indicates that the documents retained by him were obtained and used in the normal course of his duties. No proof was submitted that the documents were used for his own benefit or to SCA's detriment (*see Bigda v Fischbach Corp.*, 898 FSupp 1004, 1017 [SD NY 1995] [holding that mere copying by employee of documents used by him in course of his duties does not constitute breach of loyalty]). Rudman's uncontroverted testimony was that there was no policy against taking copies of documents home and that it was a common practice in the office (Rudman moving affidavit, ¶ 7). No evidence was submitted that either Deane or anyone in authority objected to the practice until after Rudman was fired (*see* Warner affirmation, exhibit 1 [letter dated June 1, 2009]; Sutz deposition, 543:14–19). In the absence of an express policy to the contrary, the Estate cannot maintain that the mere act of taking copies of documents home from work constitutes a wrongful act (*see Gibbs v Breed, Abbot & Morgan*, 271 AD2d 180, 185 [1st Dept 2000] [departing attorneys did not breach fiduciary duties to partners by taking duplicates of recent correspondence]). Furthermore, Rudman has denied removing any original documents from the offices, and the Estate has not produced any evidence to the contrary. Rudman has sworn (Rudman moving affidavit, ¶ 15) that he delivered all SCA documents in his possession to his attorneys, who in turn have stated that they produced them to defendants' counsel as part of discovery in this action (Eiseman moving affirmation, ¶ 3). The Estate has failed to identify any document in that production which was not already in the possession of the Deane Group. While Carol claimed

that the Deane Group is unable to locate certain "corporate books" relating to the "Landings at Fresh Creek", the only link between the disappearance of these records and Rudman that she was able to assert was that at some unknown point in time she had seen them in his office. As for the supposedly missing computer files, the Estate was unable to produce anything but a double-hearsay statement by Carol that she had been told by someone whom she could not identify that someone at LMS (whom she could not identify) had said that certain computer files could not be found. In sum, there is no evidence which raises a triable issue of fact as to whether Rudman breached his duty of loyalty to his employer.

*C. Unfair Competition*

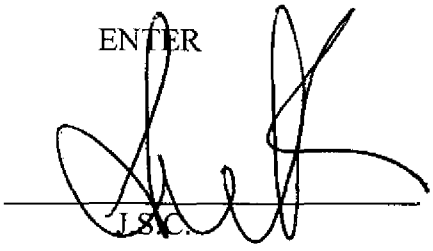
An employer can maintain a claim for unfair competition against a former employee if the employee uses "wrongful or fraudulent tactics" to compete with his former employer (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392 [1972]; *S.W. Scott & Co., Inc. v Scott*, 186 AD 518 [1st Dept 1919] [former employee "must not resort to false statements or unfair means to divert the customer of his former employer to his new employer or to himself"]). Even assuming that the Estate is directly engaged in the business of real estate management (which it is not), there is absolutely no evidence that Rudman competed with it in since he left SCA in 2009. Moreover, even were the court to give credence to the allegation that Rudman has been working for ABMI, the uncontroverted testimony establishes that ABMI never entered the subsidized housing market and, therefore, never competed with the Deane companies. The Estate has not identified *any* business opportunity which it *believes* it lost because of Rudman, whether to ABMI or anyone else. There is simply no issue of material fact as to whether Rudman competed with the Estate, whether unfairly or not. Accordingly, it is

ORDERED that the motion of plaintiff Harvey Rudman for summary judgment is granted, and the counterclaims of the Estate of Disque D. Deane are dismissed in their entirety, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to accordingly; and it is further

ORDERED that the action is severed and continued as to the causes of action in the complaint; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk in the appropriate electronic manner, who is directed to note the severance in his records.

ENTER



J.S.C.

Dated: May 22, 2014